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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

Contribution from Turkey

-- Session V --

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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Turkey --

1. Introduction

1. Public procurements hold a privileged position in the economies of all countries. Various reasons may be listed for this importance. First of all, financial policies, in addition to monetary policies also have an important role to play in the economic policies of countries. When the fact that monetary policies are generally carried out by the independent central banks is taken into account, financial policies become the most important tool that governments can use. Within the scope of financial policies, income policies and cost management can be seen as two fundamental elements. The first, consisting of taxes, is mainly under the control of a few state institutions charged with gathering income, while in the cost management area many institutions may intervene. This is due to the fact that goods and services procurements by public institutions and organisations are not carried out centrally; instead, each institution or organisation makes its purchases within its allocated appropriation, in accordance with its relevant legislation. Consequently, in public procurements, the state acts as a buyer within the economy and directly intervenes in the economy. In other words, public procurements have an important place in the economic lives of nations, since they are financial policy instruments which may be characterised as direct interventions in the economy.

2. Secondly, public procurements are important because they involve the use of the taxes collected from the citizens for their funding. It is a requirement of democracy that governments spend properly the taxes they collect from their citizens based on their sovereign rights. This is because expenditures are made on behalf of the citizens and citizens decide, through the members of the parliament, on where the money should be spent. For that reason, public procurements, which are funded by the taxes paid by the citizens, must be made in an efficient manner.

3. Another point that reflects the importance of public procurements is their share within the economy. Statistically, public procurements constitute 15% of the Gross Domestic Product (GDP) in OECD states, while this ratio is even higher in other countries. Some numbers from Turkey may be beneficial in explaining why public procurements are important. According to the Public Procurement Authority (PPA) (2009) report¹, public procurements of about 84 billion TL were made in 2008. This corresponds to around 8.8% of the GDP of Turkey for the year 2008, which was listed as approximately 950 billion TL in the Turkish Statistical Institute (TSI) (2009) data², and it demonstrates more clearly the importance of public procurements for the country's economy. According to another piece of data from PPA³, annual sum of public procurements in Turkey corresponds to about 10% of the GDP.

1. PPA, Public Procurements Monitoring Report 2008.

2. TSI, News Bulletin, Issue 52.

3. http://www.tbmm.gov.tr/develop/owa/dosya_p.indir?pDosyaAdi=F1902048463_pbk23112009.pdf, p.9, paragraph 4.

4. Considering they use a significant portion of the country's income, lightening the burden of public procurements on the state budget and ensuring their efficiency is closely related to the establishment and protection of competition. As a matter of fact, Article 5 of Act no 4734 (Public Procurement Law) lists the basic principles to be followed in public procurements as follows: transparency, competition, equal treatment, reliability, secrecy, public supervision, meeting the needs under fair terms and in a timely manner, and efficient use of resources.

5. Ensuring competition in public procurements depends on properly analysing the product and market conditions and designing the tender in a way most appropriate for the existing conditions. Also, obtaining an efficient result in the tender process depends on absolute prevention of competitors from engaging in anti-competitive agreements during the tender processes. In other words, preventing collusive bidding by the competitors is very important in order to obtain the expected benefits of the tender. This is because it is beneficial for public welfare to ensure competition in a market that corresponds to at least 10% of the country's GDP.

2. Tender Markets and Competition in Turkey

6. Collusive bidding has a very significant place in competition law. When collusive practices which are among the gravest infringements of competition occur, especially in public procurements, their damage extends to the society at large. Therefore, worldwide competition authorities watch tenders more vigilantly. Likewise, the Turkish Competition Authority (TCA) works with an aim to protect competition in public procurements as well and has made important decisions. Below some decisions by the Competition Board, the decision making body of the TCA, will be given, together with a discussion of their implications.

2.1. *Medical Consumables Decision*⁴

7. In the said decision of 2007, the fact that the undertakings selling miscellaneous medical consumables refrained from participating in tenders opened by hospitals was deemed as setting of supply conditions outside of market. This is because, when hospitals opened tenders to purchase consumables, undertakings operating in the market were concerned that the tender procedure would lower prices and decrease their profits, and they consequently decided to boycott the tenders. In compliance with the boycott decision, the undertakings did not bid in the tenders and the hospitals faced difficulty in purchasing their urgent needs. Hence it becomes clear that, collusive bidding may not only damage the economy but also, more importantly, human life and health.

2.2. *Medical Laboratory Decision*⁵

8. The decision taken during the last days of 2008 involves many of the infringements of competition that may occur in tender markets. The allegations that the undertakings that were found to have infringed the Competition Act by this decision were engaged in:

- Making collusive bids while determining the estimated cost prior to a tender;
- Submitting “cover bids” in favour of one another in tenders⁶;

4. Competition Board Decision dated 16.3.2007 and numbered 07-24/236-76.

5. Competition Board Decision dated 19.12.2008 and numbered 08-74/1180-455.

6. Cover bid is a concept frequently used by undertakings that participate in a tender. It suggests that, a bidding undertaking asks another undertaking that is normally not going to participate in the tender or does

- Making collusive bids in tenders;
- Entering into subcontracting agreements among themselves after winning contracts;
- Participating in the tender both on their own behalf and on behalf of another undertaking which they jointly own, were examined and there were findings that substantiated these allegations.

9. One thing in common between this decision and the previous one is the assistance received from the prosecutors' offices. The most important evidence used in both of the cases was based on the information and documents obtained by the prosecutors' offices during prosecutions for bid rigging offenses⁷. It must be said at this point that competition authorities, public procurement authorities and prosecutors' offices should work in close co-operation. In fact, in every case, information from the public authorities that lay down regulations in the market concerned by the tender is also very helpful. For instance, in the Medical Laboratory decision, the information obtained by the Ministry of Health Inspection Committee during their investigation on the matter was also used by the TCA.

2.3. *Medicine Decision*⁸

10. Similar to the Medical Consumables decision, undertakings boycotting the tenders by hospitals for purchasing medicine and serum were found to violate the Competition Act and were imposed fines. With respect to this decision, it should be emphasised that undertakings that decide to boycott tenders that are vital for patients' life and health do not create only economic harm.

11. As it is seen, the three decisions mentioned above are related to the health sector. Although there are many undertakings party to those decisions, the number of participants in the tenders that are the subjects of the decisions decreases and there are usually three or four participants in the tenders.⁹ The most important reason for this is the fact that the number of undertakings reduces at the regional level. In other words, few undertakings participate to hospital tenders in various regions, however as the number of regions increases, the number of undertakings also increases. Moreover, it should be noted that the number of manufacturers is limited in the tenders especially in medicine, consumables and laboratory equipment, in the health sector. The dealers of those manufacturers participate to the tender; consequently, the number of competing brands at the tender base is limited. Therefore, one of the most important reasons for the difficulties in the health sector is the oligopolistic structure.

12. As of the beginning of the year 2009, the TCA examined 34 files related to tenders. 17 of those files were subject to investigation whereas 12 of them were closed after the preliminary inquiry stage. Most of the investigations are carried out in the health sector (medical device, medicine, laboratory equipment and consumables). Cement, ready-mixed concrete, refractory, transportation, fertiliser, accumulator, bread, traffic signalisation, milk and automotive can be listed among other sectors.

not intend to win the contract, to submit an artificial bid to give the impression that there is competition in the tender. Thus, the first undertaking submits a so-called competitive bid by offering a lower bid than the cover bidder.

7. Besides being an infringement of competition under the Competition Act, collusive bidding also constitutes a bid rigging offense under the Turkish Penal Code (numbered 5237) (Article 235, (2), d.).
8. Competition Board Decision dated 19.1.2007 and Numbered 07-07/43-12.
9. http://www.rekabet.gov.tr/dosyalar/images/file/Ekonomi/pamukkale2009/ucar_aygun.ppt#283,27, Sonuç ve Öneriler [Conclusion and Recommendations]. In a study on the health sector (laboratory equipment), the number of participants is less than three in 237 of 310 tenders.

3. Corruption

13. Corruption is often encountered in public procurement tenders. Many researches show that corruption is a widespread phenomenon in public procurement along with customs, licences, and construction (Acar and Emek, 2008).¹⁰ The Public Procurement Law contains significant provisions on probity and anti-corruption. It already contains the mandatory exclusion requirements of the latest EC Directives on selection, and also defines and prohibits other forms of bribery and corruption in a separate article. The Public Procurement Law also provides for sanctions and penalties in the event of discovery, which apply to both individuals and companies and can lead to temporary or permanent disbarment, depending on the severity or frequency of the crimes. In the event of criminal activity, the Public Procurement Law provides for action by the public prosecutor and the criminal authorities (SIGMA, 2009). Allegedly corrupted contracts of procurement have been investigated by independent inspection boards which are embedded and widely distributed in the administrative system. These boards are related to various entities such as Turkish Parliament, Presidency, Prime Ministry and line ministries.

14. The public procurement has long been singled out by the public and its officials as one of the most corruption-prone areas in need of an urgent and comprehensive reform.¹¹ Arguably, the EU decision to grant Turkey candidate status during Helsinki Summit in 1999 and the economic reform program ‘Strengthening the Turkish Economy’, which was put into implementation right after 2000-2001 financial crisis, significantly contributed to the hands of the reformers desiring to enhance anti-corruption efforts, including preparation and adaptation of a new Public Procurement Law (Acar and Emek, 2008). As stated in the Ninth Development Plan: ‘new procurement law with competitive and transparent tender rules and in conformity with international norms aims, among others, to increase effectiveness and to prevent corruption’ (SPO, 2006: 28).

15. Although the TCA does not have any authority to investigate corruption, it is required to notify the relevant authorities, which are mainly the prosecutor or the inspection departments of the relevant government agencies in case it obtains any findings on corruption. For instance, in the Medical Laboratory decision mentioned above, because the information received by the TCA also included allegations of corruption they were sent to the prosecutors.

16. Corruption in tenders usually occurs while the tender specifications document is prepared. Existence of terms that seems to restrict competition in the tender specifications document, which determines the characteristics of those who could participate in the tender, may sometimes be the result of corruption. In other words, tender specifications may be prepared in such a way that they may designate a certain undertaking aimed to be the winner as a result of the tender via a secret agreement between the authorised personnel of the undertakings and the public officials. The public official, who prepares the tender specifications document in favour of the relevant undertaking, may obtain illegal advantages. The prosecutors and other government agencies carry out examinations about the public official and the authorised personnel of the undertakings under these circumstances. Moreover, the relevant tender may also be cancelled. According to Article 12 of the Public Procurement Law, tender specifications document should not include terms that restrict competition or designate a specific brand or model or specify features

10. According to Ministry of Construction in Turkey quoted in an OECD study “[u]ntil the enactment of the new Public Procurement Law in 2003, Turkey has suffered exceptionally high construction costs by international comparison. For instance, the cost of construction for 1 km of highway was US\$ 10 million in Turkey, compared to international reference price of a US\$ 4 million’ (Gönenç et al., 2005).

11. For example, the Seventh Development Plan envisioned in 1995 that “public procurement legislation would be changed to provide competition and transparency ..., and would be harmonised with EU Directives” (SPO, 1995).

or definitions indicating any brand or model. For instance, PPA decided in a decision¹² taken in 2003 that the fact that a certain model had been designated in the tender specifications document was unlawful.

17. Moreover, the Public Procurement Law sets out appropriately the content of tender documents and tender notices. In this respect, Public Procurement Law's qualification criteria largely reflect those of the EC Directives, including the more recent mandatory exclusion provisions. Besides, under the Public Procurement Law, the open procedure is the basic procedure; other procedures restricting competition such as restricted and negotiated procedures may only be applied when special conditions for their use have been fulfilled. Although there are concerns about the compatibility of the Public Procurement Law with the current EU legislation, as highlighted by SIGMA (2009) it is fair to say that the current Public Procurement Law has many significant similarities with EU procurement legislation on which it was closely modelled.

4. Conclusion and Suggestions

18. As it is known, collusive bidding is a subject seriously emphasised in competition law. There are many studies which only discuss the analysis of collusive bidding according to competition rules. A market corresponding to 15% of the GDP in average for OECD countries and approximately 10% of the GDP for Turkey deserves being monitored in detail by competition authorities. Thus, competition authorities whose task is to protect competition spend significant amount of work for preventing the restriction of competition by undertakings in tenders in every country.

19. Support by other institutions and agencies is also important in terms of tender markets to which competition authorities devote considerable time. Public procurement authority of the country and judicial authorities should be the primary institutions with which the competition authorities should co-operate. Especially, competition authorities that do not have the power to wiretap should get support from agencies that have such power. Most of the evidence is collected by judicial agencies in tenders where the most secret cartels are formed in Turkey as well. Providing competition authorities with access to data concerning tenders plays an important role in fighting with collusive bidding. Accordingly, the TCA and PPA concluded a co-operation protocol on 14.10.2009.¹³ The said protocol aims to increase the co-operation between two agencies that work for establishing and protecting competition in tenders. Moreover, the TCA provides training in public institutions and agencies as well as in the private sector in order to prevent possible competition infringements in tenders. In addition to this, a guideline, which public institutions and agencies can easily comprehend and benefit from, is currently under preparation within the TCA.

20. Consequently, the TCA closely examines tenders in order to prevent collusive bidding. There are important decisions on this subject. Moreover, it co-operates with public authorities, particularly with PPA and the public prosecutors' office.

12. Decision dated 5.1.2003 and numbered 2004/UK.Z-10 is available via <http://vatandas.ihale.gov.tr/karargoster.asp?k=393&metin=>.

13. <http://www.rekabet.gov.tr/dosyalar/images/file/RK-K%C4%B0K%20Protokol%2014%2010%202009.pdf>.

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